

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

FAMILY RESEARCH COUNCIL ACTION,
INC., *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., *et al.*,

Defendants.

Civil Action No.: 4:22-cv-00209-O

PLAINTIFFS' BRIEF IN RESPONSE TO THE COURT'S MARCH 24, 2022 ORDER

There was already a case against the "Mask Mandate" pending before this Court brought by a Member of Congress and the State of Texas, *Van Duyne v. Centers for Disease Control and Prevention*, No. 4:22-cv-122, when this case was filed on March 23, 2022. Federal Rule of Civil Procedure 42 authorizes a district court to consolidate cases "involv[ing] a common question of fact." On March 24, 2022, this Court ordered the parties to brief whether the Court should consolidate these two cases. ECF No. 8. Plaintiffs respectfully offer this short brief in response to the Court's order.

Plaintiffs agree with both Congresswoman Van Duyne and the Department of Justice that any hearing on motions for a preliminary injunction should not be consolidated with a trial in either of these cases. *See* No. 4:22-cv-122, ECF No. 18 at 1; ECF No. 19 at 1. Plaintiffs also agree that a trial should not be necessary to assess the legality of the Mask Mandate, and thus that the matter should be resolvable on summary judgment. *See* No. 4:22-cv-122, ECF No. 18 at 1.

Congresswoman Van Duyne has asked for a preliminary injunction, and that motion has already been fully briefed for this Court in that case. The Court has the prerogative to rule on that

motion at any time. And Plaintiffs here have moved for a temporary restraining order, in addition to a preliminary injunction. ECF No. 14. Should this Court grant the temporary restraining order, argument on Plaintiffs' motion for a preliminary injunction, ECF No. 10, may become unnecessary, as it is possible that the current Mask Mandate might expire on April 18, 2022, in which event it is possible that both cases could become moot on that date.

All that being so, Plaintiffs do not believe that consolidating these cases prior to April 18, 2022, would conserve judicial resources or significantly benefit the Court. Should this case continue to be justiciable after that date, either because Defendants extend the Mask Mandate beyond April 18, 2022, or because the Mask Mandate is terminated in a manner that satisfies an exception to normal principles of mootness, Plaintiffs take no position on consolidation, deferring to the Court's determination as to what best conserves scarce judicial resources and benefits the Court in resolving these legal challenges. Given that both cases challenge the legality of the requirement to wear masks on commercial airplanes, this Court might find consolidation desirable. However, given that both cases raise different challenges, and several Defendants in Plaintiffs' case are not named in Congresswoman Van Duyne's case, this Court might find consolidation inconvenient, and could instead perhaps hear both cases *seriatim* as an alternative to consolidation. Given that the same judge is deciding both matters on similar timetables, it is unlikely that there will be much of a practical difference for this Court.

April 8, 2022

Respectfully submitted,

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**Pro hac vice* application forthcoming

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

On April 8, 2022, I filed the foregoing document with the clerk of court for the United States District Court, Northern District of Texas. I hereby certify that I have served the document on all counsel and/or pro se parties of record by a manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kenneth A. Klukowski
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